IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

O R D E R

(1) S.B.CRIMINAL MISC. PETITION NO. 436/2006
(Kharta Ram Choudhary Vs. Banshidhar & Anr.)

(2) S.B.CRIMINAL MISC. PETITION NO. 437/2006
(Kharta Ram Choudhary Vs. Babulal & Anr.)

(3) S.B.CRIMINAL MISC. PETITION NO. 438/2006
(Kharta Ram Choudhary Vs. Smt. Nirmala Devi & Anr.)

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Date of Order : 17/07/2006

PRESENT

HON'BLE MR. JUSTICE H.R.PANWAR

Mr. G.R.Punia for the petitioner.
Mr. Pradeep Shah for the non-petitioner No.1.
Mr. J.K.Chanda for the non-petitioner No.2.

BY THE COURT:-

All these three criminal misc. petition under Section 482 Cr.P.C. are directed against the orders dated 14.11.2005, 06.10.2005 and 13.7.2005 passed by Chief Judicial Magistrate, Barmer (for short 'the trial court' hereinafter) in Criminal Cases No.696/05, 556/05 and 272/05 respectively, whereby the trial court took the cognizance of the offence against the petitioner and issued process. Since all the three petitions involve common question of law and facts and arise

between the same parties, therefore, with the consent of counsel for the parties, they are heard together and decided.

It is contended by the learned counsel for the petitioner that notice as envisaged under Section 138 of the Negotiable Instruments Act, 1881 (for short 'the Act' hereinafter) has not been served on the petitioner demanding cheque amount. It is further contended that the complainant's son and the petitioner are the partners in a firm and there has been some business dealings which have not been disputed according to learned counsel for the petitioner. Lastly, it was contended that the petitioner misplaced his cheque book, for which the petitioner lodged a first information report, in which after investigation, the police filed a negative final report.

Learned counsel appearing for the complainant non-petitioner submits that the notice has been served on the petitioner and cheques were issued by the petitioner in favour of the non-petitioner complainant. Learned counsel further submits that the signatures on the cheques have not been disputed by the petitioner and lastly submits that the controversy involved in the instant case stands squarely covered by decision of Hon'ble Supreme Court in D. Vinod Shivappa Vs. Nanda Belliappa, JT 2006 (11) SC 187. He also submits that on the similar facts and

circumstances, a petition filed by Moti Singh in S.B.Criminal Misc. Petition No. 1277/2005 has been dismissed by this Court.

I have given my thoughtful consideration to the rival submissions made by the counsel for the parties.

So far as question of service of notice is concerned, it is admitted by the petitioner that the petitioner is residing at B-4, RIICO Colony, Jaisalmer and notices have been addressed on the address admitted by the petitioner. The trial court prima-facie found that the notices have been served.

So far as the question of petitioner and complainant's son being partners of firm is concerned, this controversy has no direct bearing on the issue of taking cognizance.

Regarding mis-placement of the cheque book, the petitioner himself stated that in the FIR lodged by him in that respect, the police did not find case and filed a negative final report. Be that as it may. This is a question of fact and is to be decided at the trial after the petitioner adduces evidence.

In my view, the controversy involved in the instant case stands concluded by Hon'ble Supreme Court in D. Vinod

Shivappa Vs. Nanda Belliappa, JT 2006 (11) SC 187 wherein Hon'ble Supreme Court held as under :-

> "The question is whether in a case of this nature, where the postal endorsement shows that the notice could not be served on account of the non availability of the addressee, a cause of action may still arise for prosecution of the drawer of the cheque on the basis of deemed service of notice under clause (c) of proviso to Section 138 of the Act. In our view this question has to be answered by reference to the facts of each case and no rule of universal application can be laid down that in all cases where notice is not served on account of non-availability of the addressee, the court must presume service of notice."

Hon'ble Supreme Court further held that :-

> "If a notice is issued and served upon the drawer of the cheque, no controversy arises. Similarly if the notice is refused by the addressee, it may be presumed to have been served. This is also not disputed. This leaves us with the third situation where the notice could not be served on the addressee for one or the other reason, such as his non availability at the time of delivery,or premises remaining locked on account of his having gone elsewhere etc.etc. If in each such case the law is understood to mean that there has been no service of notice, it would completely defeat the very purpose of the Act. It would then be very easy for an unscrupulous and dishonest drawer of a cheque to make himself scarce for sometime after issuing the cheque so that the requisite statutory notice can never be served upon him and consequently he can never be prosecuted. There is good authority to support the proposition that once the complainant, the payee of the cheque, issues notice to the drawer of the cheque, the cause of action to file a complaint arises on the expiry of the period prescribed for payment by the drawer of the cheque. If he does

> not file a complaint within one month of the date on which the cause of action arises under clause (c) of the proviso to Section 138 of the Act, his complaint gets barred by time. Thus, a person who can dodge the postman for about a month or two, or a person who can get a fake endorsement made regarding his non availability can successfully avoid his prosecution because the payee is bound to issue notice to him within a period of 30 days from the date of receipt of information from the bank regarding the return of the cheque as unpaid. He is, therefore, bound to issue the legal notice which may be returned with an endorsement that the addressee is not available on the given address."

In this view of the matter and keeping in view the decision of Hon'ble Supreme Court in D. Vinod Shivappa Vs. Nanda Belliappa (supra), I do not find any error, illegality or perversity in the order of the trial court taking cognizance of offence as also dismissal of revision against the order. It cannot be said that the order impugned would result in manifest injustice or abuse of process of any Court.

In the result, all the three petitions are dismissed. However, it will be open to the petitioner to raise all the contentions, which have been raised in the instant petitions, before the trial court at the appropriate stage of the trial.

(H.R.PANWAR),J.

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